of the appellant's application. With respect, it must be clear from what has been stated in relation to the sole ground on which the learned judge based his decision, that the learned judge did not deal with the application on the footing that what had occurred was an irregularity within the meaning of Order 70, rule 1: he had simply held that, in serving the particulars ordered on November 24, 1979, no default had been committed by the respondent against the Order of the lower court. Hence, no question of whether the learned judge had exercised his discretion arises. The Supplementary Appeal Record shows that, by summons-in-chambers dated August 12, 1980, an application was made by the respondent to the lower court, before another judge, for the time for service upon the appellant of the particulars ordered to be extended by one day. The hearing of this application was adjourned because of this appeal. In the circumstances, it would not be proper for this court to deal with this appeal in the way suggested by learned counsel for the appellant.

Learned counsel for the respondent has also made the point that, by accepting late service without protest, the advocates for the appellant gave the impression to the advocates for the respondent that everything was in order until the service upon the latter of the appellant's summons-in-chambers on January 2, 1980; and in the circumstances, the appellant must be taken to have waived the irregularity of late service. In this connection, it should be observed that the time limit for service was fixed by a court order, and it seems hardly competent for the appellant to waive compliance with a court order: the proper means to excuse non-compliance is by way of a further court order. This order the respondent sought — but not until months later, in August 1979. He could have made his application for such an Order before the hearing of the appellant's summons-in-chambers, but he did not do so. When queried as to the delay, learned counsel for the respondent stated that it was a mistake for the respondent not to have applied for the extension earlier — a hardly — convincing reply!

Learned counsel for the respondent has cited two cases in support of his contention on waiver of irregularity: *Sheldon* v. *Brown Bayley's Steelworks Ltd. & Anor.*[2] and *Re Chittenden deceased, Chittenden* v. *Doe & Anor.*[3] However, an examination of these authorities does not appear to bear out this contention. The headnote in the *Sheldon's* case reads:

"A plaintiff in an action under tho Fatal Accidents Act, 1846, issued a writ within twelve months of the death as required by section 3 of that Act, but only effected service of it more than twelve months after its date, when, by virtue of R.S.C., Ord. 8, rule 1, it had ceased to be in force. The defendants entered an unconditional appearance to the writ, and later applied to have the service set aside on the ground that the writ had become a nullity.

Held: failure to serve the writ within the prescribed time did not render it a nullity, but was an irregularity which had been waived by the defendants' unconditional appearance, and, therefore, service of the writ would not be set aside."

Part of the decision in the *Chittenden's* case, as shown in the headnote to that case, reads:

Held: (iii) Although failure to serve an originating summons within 12 months was itself an irregularity (R.S.C., Ord. 2, rule 1(1)), application could not, by reason of Ord. 2, rule 2(1), be made to set aside the irregularity where a fresh step in the proceedings, e.g. entry of unconditional appearance, had been taken after knowledge of the irregularity."

In both cases, the fresh step mentioned consisted of an unconditional appearance by the defendant. That is not the case here. Further, acceptance of service of particulars ordered by the lower court made in breach of the order of the lower court can hardly be said, in the circumstances, to have been a step taken by the appellants in the proceedings, or to constitute a waiver of irregularity if irregularity it be.

For the reasons given the appeal is allowed with costs and the deposit is to be refunded to appellant. An order is made in terms as prayed for in the appellant's summons-in-chambers in the lower court.

Appeal allowed.

Solicitors: *Battenberg & Talma; Thomas & Co.*

LEE YOU SIN v. CHONG NGO KHOON

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Salleh Abas F.JJ.) July 8 & December 30, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 19 of 1980]

Contract — Loan — Allegation that lender had charged excessive interest — Burden of proof on borrower — Allegation of fraud.

Evidence — Burden of proof that lender had charged excessive interest — Allegation of fraud.

In this case the appellant had borrowed various sums from the respondent and his wife. He alleged that the respondent had charged him excessive interest, more than the rate agreed upon. The claim of the appellant was dismissed in the High Court and the appellant appealed.

Held: (1) in this case the burden was on the appellant to prove his claim. The learned judge had gone into the evidence carefully and reached the conclusion that the appellant had failed to discharge the onus of proof. There was no reason to interfere with his finding of the facts;

(2) as the appellant in this case was in effect alleging fraud, the learned trial judge was correct in saying that he required a higher burden of proof than is normal in a civil case.

Case referred to:-

(1) *Bater* v. *Bater* [1950] 2 All E.R. 458.

FEDERAL COURT.

Y. Sivaloganathan for the appellant.

Karpal Singh for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This is an appeal against the dismissal of a claim for the return of excess interest charged on two loans.

Plaintiff is a merchant and defendant a goldsmith. They have known one another for more than 30 years. Being in need of funds plaintiff had on occasions borrowed money from defendant and his wife. On January 24, 1962 he borrowed from defendant $10,000 and agreed to pay interest at 9.6% per annum. He lodged his land title with defendant as security. A Memorandum of Charge was executed by the parties and registered with the Registrar of Titles, Pahang. In May 1965 plaintiff borrowed from defendant another sum of $2,000 with interest at 9.8% per annum.

As security he gave two Mercantile Bank cheques for $1,000 each.

Plaintiff alleged that defendant demanded interest at 24% per annum in respect of the two loans and threatened to foreclose his land so plaintiff paid the interest demanded. Despite that demand and threat plaintiff took a second loan of $2,000 from defendant more than three years later. For a period of ten years, that is, from January 1962 to February 1972 plaintiff alleged that he had paid defendant a total interest of $24,000 at 24% per annum when he should only pay $9,680. Therefore, he claimed to have overpaid $14,520.

By a letter dated March 3, 1972 plaintiff, through his solicitors Messrs. Kam Woon Wah remitted to defendant a sum of $12,240 in final settlement of the two loans plus interest. The Memorandum of Charge was enclosed for defendant's execution. Defendant did not return the Charge until 16 months later when he was threatened with legal proceedings. Upon receipt of the abovementioned letter defendant wrote to plaintiff the following day demanding for the sum of $32 being four days' interest on the loans. Plaintiff contended that on the face of this demand it was sufficient to prove that defendant had collected excessive interest. On cross-examination defendant explained that the $32 was interest for other loans which plaintiff took from defendant's wife. It would seem that apart from taking more than two loans from defendant he had also borrowed from defendant's wife. Thus, in referring to the interest stated in two documents P5 and P7 the learned judge observed at page 57 of the Appeal Record that:—

"...But these documents P5 and P7 did not specifically and clearly say that they relate to the interest in question or else did not say that there had been an excess bearing in mind that the plaintiff said he had taken four or five loans from the defendant and loans big and small from his wife. The defendant's evidence did not help the plaintiff's case either because he said P5 relates to the arrears of interest due to him up to December. P7 was interest due to his wife and him. This was not improbable. It cannot be denied that the defendant had been in arrears of repayment as seen clearly by the defendant's letter to him in P4. He had nowhere disputed the facts stated in that letter. It was asked how could P7 be the interest due to the defendant's wife when the defendant had admitted he was not sure whether his wife had made an oral agreement with the plaintiff for the payment of interest but again that was not necessarily inconsistent with what he said. The wife had asked him to collect the interest. He did not know the actual amount of loans given by her to the plaintiff in which case he would not necessarily know whether the wife had made an oral agreement with the plaintiff to give her an interest. The husband said the wife had made small loans to the plaintiff which was not improbable considering that he had clearly taken a loan for $5,000 from her as shown in D1."

Defendant quite rightly pointed out that it was only after 10 years that there was any mention by plaintiff of overpayment of interest. The relationship of the parties became strained because of the delay by defendant in signing the Discharge of Charge. It is the plaintiff who claimed that there was overpayment of interest. The onus is on him. During cross-examination plaintiff mentioned keeping a proper account and that his son translated a copy of such account. However, the account was never produced in court. It is also strange that when plaintiff instructed his solicitors Messrs. Kam Woon Wah to write and remit payment no mention was made of overpayment of interest.

The explanation given by plaintiff in respect of the letter dated March 3, 1972 was that the $240 was interest for the two loans of $10,000 and $2,000. However, during cross-examination defendant gave a simple and straightforward answer. He said the $240 was interest due for three months, i.e. $80 per month. This works out at $8 per mensem per $1,000 and is in accordance with the Charge.

It has not been disputed by plaintiff that apart from the loan of $10,000 from defendant he took other loans from defendant and also defendant's wife for which he also paid interest. Defendant stated that plaintiff borrowed $5,000 from his wife for which plaintiff also paid interest. Because of the number of loans it would cause less confusion if plaintiff were to give clear evidence of particulars of the interest in respect of each loan. It is no use making wide allegations as in his written submission that:—

"...There are many subtle ways in which an avaricious moneylender can conceal the demand for excessive interest but there was nothing subtle in the manner in which the defendant did so...."

Defendant had explained about the interest of $32. If defendant received excessive interest plaintiff was a party to such payment. If plaintiff is saying that the whole transaction is illegal then he cannot succeed in claiming the excessive payment arising out of an invalid transaction as he was a party to it. Since plaintiff claims excessive payment of interest the burden is on him to prove the claim.

The learned judge did not say why he required a higher burden of proof than is normal in a civil action, i.e. the balance of probabilities. The statement of claim does not allege fraud but in effect that is what the plaintiff is alleging.

Bater v. *Bater*[1] is a divorce case and there Bucknill L.J. at pages 458-459 said: —

"...If a high standard of proof is to be required because of the importance of a particular case to the parties and also to the community, divorce proceedings require that high standard...."

In so saying he supported the finding of Commissioner Grazebrook who had held that in a petition for divorce on the ground of cruelty the petitioner should prove her allegation of cruelty beyond reasonable doubt.

Denning L.J. at page 459 said:—

"The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate

with the occasion. Likewise, a divorce court should require a degree of probability which is proportionate to the subject matter."

We would therefore with respect suggest the test to be applied is one set out in *Bater* v. *Bater,*[1] i.e. the learned judge was correct in relying on *Bater* v. *Bater* though his mistake was in not saying that the statement of claim in substance alleges fraud.

Plaintiff has to prove his claim. The learned judge has gone into the evidence carefully and reached the conclusion that plaintiff has failed to discharge the onus of proof. Plaintiff has every opportunity to protest about excessive interest he paid but has not done so for the last ten years. As the learned judge rightly pointed out that:—

"... He had not breathed a word of dissent or discontent or objection to the defendant or anyone for the whole of ten years that the loan was in operation. The plaintiff had at all relevant times the benefit of counsel to advise him what to do."

It is pertinent to note that the learned judge also made these observations regarding plaintiff's attitude at page 65 of the Appeal Record:—

"... Having entered into the ten thousand dollar loan agreement and been supposedly oppressed and extorted by the defendant during its tenure he had nevertheless willy-nilly entered into another contract with him for $2,000 loan and we are told other loans also and despite the harsh and bitter experience and treatment he was still undergoing under the ten thousand dollar loan. ..."

The learned judge found that the plaintiff had failed to prove his claim. We agree with his conclusion. It must be kept in mind that he had the advantage of seeing and hearing the witnesses. We have no reason to interfere with his finding of facts. Accordingly, we would dismiss the appeal with costs. Deposit to respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Malek & Joseph Au; Ariffin & Ooi.*

SYARIKAT SERI PADU SDN. BHD. v. INTAN ENTERPRISES COMPANY

[F.C. (Wan Suleiman Ag. C.J. (Malaya), Syed Othman & Abdul Hamid F.JJ.) September 8 & December 30, 1981]

[Johore Bahru — Federal Court Civil Appeal No. 119 of 1980]

Practice and Procedure — Injunction — To restrain defendant from exploiting timber on land — Agreement with plaintiff to sell all timber and logs from area — Agreement terminated — Failure to pay instalment on time — Alleged variation of agreement.

In this case the appellants had obtained the right to exploit timber over an area in Kelantan. They entered into an agreement with the respondents to sell all timber and logs from the area. The respondents had paid the appellant a total sum of $420,000 before and on signing the agreement and they also agreed to pay the sum of $280,000 by twelve postdated cheques payable every month. The respondents also undertook to pay all premiums, royalties, tributes and other fees to the State Government. One of the cheques given by the respondents was dishonoured and the appellants gave notice of termination. They also advised the Forest Department, Kelantan not to accept any payment of premium, royalty, tribute and other fees from any person except the directors of the appellant company. As a result the respondents were not able to work on the forest. The respondents thereupon terminated the agreement with the respondents on the alleged ground that the respondents had committed a breach of the agreement. The respondents brought an action against the appellants and obtained an injunction to restrain the appellants from exploiting timber on the land. The appellants applied for the injunction to be removed. The learned trial judge dismissed the application and in his grounds of judgment said, among other things —

> "The defendant (Seri Padu) alleged that there was a breach of the agreement by the plaintiff and accordingly the agreement was terminated. The defendant alleged that the terms of the agreement had been varied by a subsequent oral agreement. The method of payments had been varied and that the plaintiff had failed to comply with the new terms of the agreement as regards payment. Now whether the defendant could terminate the agreement upon new terms, varied by oral agreement, is a serious question to be tried. The validity of the defendant's action to terminate the agreement under Clause 6 of the agreement can be disputed and therefore should be argued in a trial."

The appellants/defendants appealed.

Held: (1) the learned judge was correct in holding that there was a serious question to be tried in this case. The fact that there was an oral agreement in addition to or varying the written agreement as to method of payment was all the more reason for the matter to go to trial;

(2) there were also other reasons for the case to go to trial, including the desirability of determining the real nature of the $420,000 paid before and on signing of the agreement and in what way, if at all, it affected the written agreement;

(3) the balance of convenience in this case showed that the injunction should stay. The respondents would suffer irreparable loss if it was lifted. If not for the injunction, the appellants would allow others to exploit timber from the area in which the respondents had an interest, having outlayed vast sums on it.

FEDERAL COURT.

Dato K.C. Koh for the appellant.

Raja Abdul Aziz bin Raja Addruse for the respondent.

Cur. Adv. Vult.

Syed Othman F.J. (delivering the judgment of the Court): This appeal is against the refusal of the High Court at Johor Bahru to remove an injunction issued on June 13, 1979 to restrain the appellant company (Seri Padu) from "felling cutting, extracting, selling or otherwise dealing with or disposing of any timber or logs or trees" (for convenience we shall refer to this expression as "exploiting timber") from approximately 10,210 acres of land within the Dabong Forest Reserve, Ulu Kelantan in respect of which the parties had entered into an agreement dated November 20, 1978 (the 1978 Agreement) and to restrain Seri Padu from entering into an agreement with other persons.

The appeal is mainly on facts.

Seri Padu obtained the right to exploit timber over an area of about 30,202 acres within the Forest reserve from the Kelantan State Economic Development Corporation under an agreement dated July 20, 1972. Seri Padu entered into the 1978 Agreement with Zainun, who is described as Zainun binte Md. Taib, trading as Intan Enterprises Company (Intan) to sell all timber and logs from a delineated area, described as A, within the concession.

The relevant parts of the 1978 Agreement on which Seri Padu rely in their application to remove the injunction are clauses 4, 5 and 6 which read as follows: